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76-1624, 76-1685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1521

CHANNEL TWO TELEVISION COMPANY,
THE HOUSTON POST COMPANY,
CHRONICLE BROADCASTING COMPANY,
THE CHRONICLE PUBLISHING COMPANY,
KSL, INCORPORATED (DESERET NEWS),
POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
THE WASHINGTON POST COMPANY,
WHAS, INC. (THE COURIER-JOURNAL AND
THE LOUISVILLE TIMES),
Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS CHANNEL TWO TELEVISION COMPANY, ET AL.

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[Consolidated cases listed on inside cover]

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1624

ILLINOIS BROADCASTING CO., ET AL., *Petitioners*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1685

THE POST COMPANY, ET AL., *Petitioners*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

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CHANNEL TWO TELEVISION COMPANY,
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POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
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WHAS, INC. (THE COURIER-JOURNAL AND
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Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS CHANNEL TWO TELEVISION COMPANY, ET AL.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, filed March 1, 1977, may be found at pp. 339-431 of Volume I of the Joint Appendix (hereinafter cited as "J.A."),[1] and is reported at 555 F.2d 938.[2] That court's opinion on the

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[1] Volume II of the Joint Appendix will be cited as "Exh."

[2] The Court of Appeals considered in a single opinion both this case (No. 75-1064) and several companion cases (Nos. 75-1152, 75-1289, 75-1379, 75-1386, 75-1387, 75-1388, 75-1567, and 75-1618). Petitioner Channel Two Television Company is the licensee of television and radio stations in Houston commonly owned with the *Houston Post*, which is published by petitioner The Houston Post Company; petitioners The Chronicle Publishing Company and Chronicle Broadcasting Company commonly own the *San Francisco Chronicle* and a television station in San Francisco; petitioner KSL, Incorporated, is the licensee of television and radio stations in Salt Lake City which are commonly owned with the *Deseret News* through a parent corporation; petitioners The Washington Post Company and Post-Newsweek Stations, Capital Area, Inc., commonly own *The Washington Post* and television and radio stations in Washington. Petitioner WHAS, Inc., is the licensee of television and radio stations in Louisville which are commonly owned with *The Courier-Journal* and *The Louisville Times*. All

Commission's motion to stay the mandate, filed April 5, 1977, appears at J.A. 435-444, and is reported at 555 F.2d 967. The *Second Report and Order* of the Federal Communications Commission may be found at J.A. 134-221 and is reported at 50 F.C.C.2d 1046 (1975). The Commission's *Memorandum Opinion and Order* denying petitions for reconsideration appears at J.A. 317-338 and is reported at 53 F.C.C.2d 589 (1975).

JURISDICTION

The judgment of the Court of Appeals, which appears at J.A. 432-434, was entered on March 1, 1977. A petition for certiorari was filed by the present petitioners on May 2, 1977, and other petitions were filed, respectively, by the Federal Communications Commission on April 22, 1977, by the National Association of Broadcasters on May 13, 1977, by the American Newspaper Publishers Association on May 16, 1977, by Illinois Broadcasting Company, Inc. on May 20, 1977, and by The Post Company on May 27, 1977. These petitions were all granted on October 3, 1977, and the cases were consolidated for argument. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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these petitioners were parties in Case No. 75-1064, and some were parties in one or another of the companion cases.

This brief is also supported by the Evening News Association, which owns *The Detroit News* and television and radio stations in Detroit, and The Pulitzer Publishing Company and KSD/KSD-TV, Inc., which commonly own *The St. Louis Post-Dispatch* and television and radio stations in St. Louis. These newspaper-broadcaster cross-owners were parties to the FCC proceeding, but did not pursue appeals in the court below.

STATUTES INVOLVED

Sections 2(a), 4(i), 4(j), 301, 303(g), 307(a), 307(d), 309(a) and 309(d)(1) of the Communications Act of 1934, 47 U.S.C. §§ 152(a), 154(i), 154(j), 301, 303(g), 307(a), 307(d), 309(a) and 309(d)(1), are set forth in J.A. 27-32.

QUESTIONS PRESENTED

The questions presented by the Court of Appeals decision are:

1. Whether the Communications Act requires that repeatedly-approved ownership of newspapers and broadcast stations in the same community must now be divested without any showing of public harm, and if not, whether a reviewing court may set aside a rational policy determination of the Federal Communications Commission that the public interest will not be served by divestiture.

2. Whether a reviewing court may substitute its judgment for that of the Federal Communications Commission by forbidding the Commission to grandfather existing licensees when adopting a new licensing policy prospectively in the hope of increasing diversity.

STATEMENT OF THE CASE

In 1975, after a five-year inquiry, the Federal Communications Commission adopted rules partly changing and partly continuing its traditional policy toward the common ownership of a newspaper and a broadcast station in the same community ("newspaper cross-own-

ership").[3] The rules preclude the creation of any new newspaper cross-ownerships, but grandfather existing combinations except in communities where the only daily newspaper and the only television station or the only broadcast station of any kind are commonly owned. Cross-owners in such communities must divest either the newspaper or the station within five years.

On review, the Court of Appeals affirmed the prospective rules barring new cross-ownerships but reversed the grandfather rules. The court held that the policy of the prospective rules must be applied to existing cross-ownerships as well, and instructed the Commission to require their divestiture subject to waiver in exceptional cases.

Background of the Administrative Proceeding

Local newspaper owners have operated broadcast stations in their home communities since the early days of broadcasting. In many cities they were the broadcast pioneers, who made the financial commitment and took the risks to establish the first radio or television station at a time when the prospects for profit were uncertain or distant. Confronted with a scarcity of qualified and willing licensees, the Commission not only granted licenses to these newspaper owners, but, in the case of television, affirmatively encouraged them to provide a local broadcast service.[4]

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[3] The text of the rules is set forth at J.A. 243-263. There are separate rules for cross-ownerships involving AM radio, FM radio, and television stations respectively.

[4] Second Report and Order at ¶ 100, J.A. 190; National Ass'n of Broadcasters' Comments and Arguments on the Proposed Rules (April 8, 1971) at 93-95.

The Commission's encouragement of newspaper cross-ownerships ceased as the supply of qualified applicants increased, but its approval of newspaper cross-ownership as consistent with the public interest did not. In choosing among competing applicants for new stations, the Commission came to favor those who lacked other media interests in the community, because such applicants were presumed more likely to add to the diversity of viewpoints expressed through the local media.[5] But like other such predictive presumptions developed by the Commission for selection among applicants for new stations, this policy has not been treated as controlling in proceedings for the renewal of existing licenses. The Commission has consistently renewed the licenses of the newspaper cross-ownerships that it previously encouraged or approved, if the licensee has not been guilty of a pattern of abuses of its common ownership and if the station's performance has otherwise served the public interest.

This long-standing distinction in Commission policy between new cross-ownerships and the renewal of existing licenses was preserved in the Notice of Proposed Rule-Making that initiated the first phase of the instant proceeding in 1968.[6] In that 1968 Notice, which did not apply to newspaper cross-ownerships, the Commission proposed a prospective rule barring the licensing of new *broadcast* cross-ownerships, *i.e.*, cross-ownerships of a television and a radio station or of an AM radio and an FM radio station in the same market.

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[5] *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-95 (1965).

[6] Multiple Ownership of Standard, FM, and Television Broadcast Stations, Notice of Proposed Rule-Making, 33 Fed. Reg. 5315 (1968).

Existing cross-ownerships were to be unaffected. Such a prospective rule was adopted as to television-radio combinations in a *First Report and Order* of March 1970.[7]

At the same time, the Commission issued a Further Notice of Proposed Rule-Making to consider whether newspaper cross-ownerships should be similarly proscribed.[8] Newspaper cross-ownership was to be considered primarily because studies submitted in the first phase of the proceeding had indicated that daily newspapers and television stations were the two sources most commonly looked to by the public for news and information about public affairs.[9] For this reason, the Commission hypothesized that "it is not desirable that these two organs of mass communication should be under the same control in any community."[10]

The Further Notice also invited comments on a proposal to break up by divestiture both all existing newspaper cross-ownerships and all existing television-radio cross-ownerships of the sort prohibited prospectively under the *First Report and Order*. Although the Commission had initially believed that divestiture should not even be considered, a few comments submitted in response to the 1968 Notice had urged dissolution of

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[7] Multiple Ownership of Standard, FM, and Television Broadcast Stations, First Report and Order, 22 F.C.C.2d 306 (1970) (J.A. 33), *modified* in 28 F.C.C.2d 662 (1971). As later modified, the rule applied only to VHF television cross-ownerships, thus excluding UHF television stations.

[8] Multiple Ownership of Standard, FM, and Television Broadcast Stations, Further Notice of Proposed Rule-Making, 22 F.C.C.2d 339 (1970) (J.A. 101).

[9] *Id.* at 344-46 (J.A. 111-115).

[10] *Id.* at 346 (J.A. 115).

existing combinations as a means of further increasing diversity in local media,[11] and the Commission inferred from other comments the possibility that divestiture could be accomplished without serious disruption.[12] The Commission nonetheless emphasized that it had "insufficient information on the subject,"[13] and voiced "substantial concern" about the potential disruptive effects of divestiture on the broadcast service of divested stations.[14]

The Record Developed Before the Commission

The public response to these new proposals was voluminous and broadly based. Some 200 parties filed written submissions in two separate rounds of comments and replies,[15] after which the Commission heard two and one-half days of oral argument from 45 parties.[16] The parties included not only affected broadcasters and newspaper owners, but also "public interest" advocates, economists and other researchers, student groups, private individuals, and the Antitrust Division of the Department of Justice. Besides argument, the submissions presented a variety of academic studies and research analyses of newspaper cross-ownership, and

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[11] *Id.* at 340 (J.A. 102-03).

[12] *See id.* at 341, 347-48 (J.A. 105, 118-19).

[13] *Id.* at 340 (J.A. 103).

[14] *Id.* at 348 (J.A. 119).

[15] Second Report and Order at Appendix A (J.A. 221). After the first round, the Commission requested additional comments focused on specific questions which it believed required further attention. Memorandum Opinion and Order, 45 F.C.C.2d 768 (1974) (J.A. 127).

[16] FCC Public Notice 26054-B, July 15, 1974 (Exh. 922).

numerous detailed examinations of the operating relations between specific commonly-owned newspapers and broadcast stations.

Although a number of parties supported the Commission's proposed rules, they relied almost entirely on theoretical and policy arguments rather than on evidence of actual practice. They emphasized the *potential* for abuse in the form of joint use of commonly-owned media to propagandize or to restrain competition, and the presumption that an increase in the number of independent competing media owners will increase either economic competition or the diversity of viewpoints expressed through the media. They also argued that there is an inherently undesirable media concentration in cross-ownership markets.[17] But "no claims were made that newspaper-television station owners have committed any specific non-competitive acts. . . ."[18] And there was no showing in the record of a pattern of other sorts of abuses of cross-ownership by existing cross-owners.[19] Similarly, only one submission

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[17] *See* Comments of the U.S. Dept. of Justice (May 18, 1971) at 22-30; Supplemental Comments of the U.S. Dept. of Justice (May 15, 1974) at 3-13; T. de Jonckheere, "Monopoly in the Media"; Further Comments of NCCB (May 15, 1974) (Exh. 843-844).

[18] Second Report and Order at ¶ 96 (J.A. 186).

[19] The only attempted showing of any such abuses in the record were remarks by three parties at oral argument, each citing a lone instance of alleged abuse. In fact, two of the three incidents involved alleged conduct of a single cross-owned medium ostensibly unrelated to cross-ownership. *See* Transcript of Oral Argument, F.C.C. Dkt. 18110 (Exh. 936, 942). The remaining allegation concerned a rule of a cross-owned newspaper prohibiting its employees from appearing on competing television stations. *Id.* (Exh. 938-939).

A broader showing of abuses was attempted *outside* the record in a paper by Stephen Barnett, mailed to individual Commissioners after the record was complete. "Cross-Ownership of Mass Media in the Same City: A Report to the John and Mary R.

made a substantial attempt to document any actual adverse consequences of newspaper-broadcast cross-ownership in general;[20] and its conclusion (that television stations commonly owned with newspapers in the same market charge somewhat higher advertising rates than other stations) was shown by other studies to be both defective in methodology and wrong in result.[21]

Markle Foundation" (1974) (Exh. 990). This paper collected from newspaper stories, magazine articles, congressional testimony and filings at the FCC all discoverable allegations of misconduct ever made against a newspaper cross-owner. Most of the allegations were untested hearsay. Some were contentions that had been tested and rejected by the Commission in other proceedings. Most were in any event not allegations of misuse of cross-ownership but rather allegations of misconduct involving a single medium of the sort that any owner might commit. Had it properly been a part of the record of this proceeding, the study would not have shown any pattern of abuses of cross-ownership. Although it was not part of the record, the court below saw "no harm in taking notice of it" in the process of concluding that "the record was essentially inconclusive" on the question of whether cross-ownership in practice had either harmful or beneficial results. (J.A. 403 n. 71, 403-04, 413-14).

[20] Owen, "Empirical Results of the Price Effects of Joint Ownership in the Mass Media" (1969), Appendix I of J. Rosse, B. Owen, D. Grey, *Economic Issues in Joint Ownership of Newspaper and TV Media* (referred to by the Commission as the "Rosse" study).

[21] Reply Comments of Post-Newsweek Stations, Capital Area, Inc. (June 17, 1974) (Exh. 899); A. Lago and D. Osborne, "A Quantitative Analysis of the Price Effects of Joint Mass Communication Media Ownership," Exhibit B (Revised) to NAB Comments, *supra* note 4. These studies show that, among its other errors, the "Rosse" study simply overlooked the obvious correlation between higher television advertising rates and larger audiences.

The Commission also considered a study purporting to demonstrate that the populace of one cross-ownership market (Zanesville, Ohio) was less well informed on public affairs than the populace of one community where there is no cross-ownership (York, Pennsylvania). American Institute for Political Communication, "The Effects of Local Media Monopoly on the Mass Mind" (1971) (*see* J.A. 187). The findings of this lone isolated case study could

On the other hand, the submissions in opposition to the proposed rules included a variety of studies of the extent of newspaper cross-ownership and its effects. Studies of this sort showed that the number of independently-owned major media in typical markets has greatly increased, not decreased, over the years;[22] that the incidence of newspaper-television cross-ownership has been decreasing both absolutely and in relation to the total number of television stations;[23] and that there is a variety of separately-owned media in all markets ranging as high as several hundred in typical large urban areas.[24] Another study demonstrated that newspaper cross-owners as a group provide much greater continuity of ownership than do other owners.[25] In

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readily be explained by the fact that the York market is served by many more major local media and reached by many more outside media than the small and remote Zanesville market. *See* M. Seiden, "Mass Communications in the United States" (1970), Exhibits A-2, A-4 to NAB Comments; *id.*, Summary Volume (Exh. 466).

[22] C. Sterling, "Ownership Characteristics of Broadcasting Stations and Newspapers in the Top 100 Markets: 1922-1967", Exhibit C to NAB Comments, *supra* note 4, and Supplement to Exhibit C (May 1974) (Exh. 680, 690-692, 868, 871).

[23] Sterling, *supra* note 22 (Exh. 682-687), and Supplement at Tables 7 and 8; J. Udell, "Economic Consequences of FCC Proposal and Critique of Relevant Literature," Comments of American Newspaper Publishers Ass'n (April 2, 1971) [hereinafter cited as "ANPA Comments"] Vol. II, Study D at D-27-D-29; ANPA Comments Study E at E-31; Supplemental Statement of NAB and Exhibit F Regarding Recent Transfers of Broadcasting Stations (Revised) (May 1974).

[24] Seiden, *supra* note 21; ANPA Comments, *supra* note 23, at E-21-E-30.

[25] Robbins, "A Study of Pioneer AM Radio Stations and Pioneer TV Stations," Exhibit D to NAB Comments, *supra* note 4 (Exh. 694).

addition, the Commission itself analyzed the data submitted for its public files in newly-required annual program reports and concluded that stations affiliated with newspapers broadcast more local news, public affairs, and other non-entertainment programming than other stations.[26]

The record also showed that cross-owned newspaper and broadcast stations commonly operate as separate media, with separate and autonomous news, editorial, and sales operations and personnel, and no common editorials, common advertising rates, or joint sales.[27] Despite common ownership, the station and the newspaper compete vigorously for such advertising as is adaptable to both media.[28] These showings were supported by a study demonstrating a lack of correlation

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[26] Second Report and Order at Appendix C (J.A. 230). Two previous studies submitted in support of the proposed rules, which did not have the benefit of the annual program report evidence on which the Commission based its study, had concluded that there was no substantial difference in the programming performance of newspaper-affiliated and non-newspaper-affiliated stations. Comments of Students FCC Study Group, Appendix A (May 17, 1971); H. Levin, "The Policy on Joint Ownership of Newspapers and Television Stations, Some Assumptions, Objectives, Effects."

[27] *E.g.*, Comments of The Washington Post Company *et al.*, (Exh. 732-733); Comments of the Houston Post Company, Channel Two Television Company, and KPRC Radio Company (May 17, 1971) (Exh. 719-721); Comments of Pulitzer Publishing Company, May 17, 1971 at 5-6; Comments of KSL, Incorporated, May 15, 1974 at 4; Supplemental Comments of The Chronicle Publishing Co. and Chronicle Broadcasting Co., May 15, 1974 at 9-10; Comments of WHAS, Inc., May 17, 1971 at 14-15.

[28] *E.g.*, Comments of The Washington Post Company *et al.*, *supra* note 27 (Exh. 732-733); Comments of A. H. Belo Corporation, May 17, 1971, at 8-9 (Exh. 730-731); Supplemental Comments of The Chronicle Publishing Co., *et al.*, *supra* note 27, at 10.

in fact in the news content of cross-owned stations and newspapers.[29]

A number of submissions considered the possible adverse economic consequences of divestiture on the scale proposed.[30] These submissions foresaw a danger that such divestiture could result in a scarcity of available investment capital for broadcasting, with attendant high interest rates, which could adversely affect the service rendered by the new owners of divested stations and the broadcast industry in general.

The Second Report and Order

In evaluating this voluminous record, the Commission began by emphasizing that the proposal for divestiture, "[a]lthough not unprecedented . . . was a departure from the typical Commission approach of limiting any new rules to prospective effect." (J.A. 137, ¶ 5). That proposal, the Commission said, had to be "examined separately" from the prospective rules and tested by different criteria. (*Id.*). In particular, the Commission had to consider "the impact that divestiture would have, taking into account factors not present in connection with prospective rules, . . . which

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[29] J. Anderson, "Broadcast Stations and Newspapers: The Problem of Information Control: A Content Analysis of Local News Presentations" (1971), Exhibit E to NAB Comments, *supra* note 4 (Exh. 639-642); *see also* Comments of Cox Broadcasting Corp. (1971) at Appendices A and B.

[30] *E.g.*, First National City Bank, "Financial and Investment Issues of Forced Divestiture," ANPA Comments, *supra* note 23, Vol. II, Study B; *see also, e.g.*, Frazier, Gross & Co., Inc., "Valuation of Newspaper Owned Television and Radio Stations Affected by The FCC's Proposed Divestiture Rule," ANPA Comments, *supra* note 23, Vol. II, Study A.

must be examined if fairness is to be achieved." (*Id.* at 189, ¶ 99).

The proposed new rules were intended to further the Commission's "longstanding policy of promoting diversification of ownership of the electronic mass communications media." (*Id.* at 138, ¶ 9). That policy is in general designed to promote both "diversity of viewpoints and economic competition." (*Id.* at 189, ¶ 99). The Commission views "diversification of ownership," or what it sometimes refers to as "diversity of control" or "diversity of programming sources," as a tangible means to an "abstract goal" of maximizing the flow of information and argument into "an uninhibited market place of words and ideas in which truth will ultimately prevail . . . ."[31] While separate ownership of separate media does not necessarily increase diversity of content,[32] the Commission presumes that "[t]he divergency of their viewpoints"[33] is ordinarily likely to be greater than under common ownership.

The Commission adopted its prospective rule barring new newspaper cross-ownerships on the basis of this theoretical expectation that the grant of a new license to an applicant other than a local newspaper owner

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[31] Second Report and Order at ¶¶ 9, 10, 108, 110 (J.A. 138-40, 197, 199), *quoting* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[32] It would not do so, for example, where each of the commonly owned media presents a diversity of viewpoints as a matter of policy, or presents a greater volume of information and opinion than would separate owners, or where the separate owners share and promote common economic interests or political views. *See, e.g.*, Comments of Post-Newsweek Stations, Capital Area, Inc. (May, 1974) (Exh. 830-831).

[33] Second Report and Order at ¶ 111 (J.A. 200).

would "add to local diversity." (*Id.* at 191, ¶ 101). In the Commission's view, this was a "worthwhile goal" even if the need for greater diversity was not "urgent," since it could be accomplished without any substantial countervailing harm to the public interest. (*Id.* at 193, ¶ 104). Conceding that "newspapers brought a pioneering spirit to broadcasting" in its early days, the Commission felt "obliged to give recognition to the changes which have taken place . . . ." Now, the broadcast medium had "matured" and become profitable, and newspapers were no longer "the sole reservoir of experience on which reliance has to be placed." Thus, the Commission concluded,

> "the special reason for encouraging newspaper ownership, even at the [presumed] cost of a lessened diversity, is no longer generally operative in the way it once was." (*Id.* at 190, ¶ 100).

Where divestiture of existing cross-ownerships was concerned, however, the "abstract goal" of diversity, while no less important, was no longer "the only point to consider." (*Id.* at 197, ¶ 108). The additional public interest considerations presented by the divestiture proposal included not only the "matter of fairness," but also the potential adverse consequences that broad-scale divestiture might have on broadcast service. The Commission expressed concern that "[r]equiring divestiture could reduce local ownership . . ."; that the "continuity of operation would be broken" and the divested owner's "[l]ong knowledge of the community" would be lost; and that "local economic dislocations" and increased interest rates for broadcast capital might occur "as a result of the vast demand for equity capital. . . ." (*Id.*)

The Commission focused particularly on the loss of the unusual continuity of meritorious service exhibited by newspaper-affiliated licensees. "[S]tability and continuity of ownership," it said, "do serve important public purposes." In the case of newspaper-related stations, "[t]raditions of service were established and have been continued," leading in many cases to an exceptionally "long record of service to the public." (*Id.* at 197-98, ¶ 109). As a group, newspaper-affiliated broadcast stations "show an undramatic but nonetheless statistically significant superiority . . . in a number of program particulars." (*Id.* at n.26). Moreover,

> "[e]ntrance and exit from broadcast ownership by these parties are determined by factors other than just profit maximization. Many began operation long before there was hope of profit and were it not for their efforts service would have been much delayed in many areas." (*Id.* at 197-98, ¶ 109).

Divestiture of such ownership "introduces the possibility of disruption for the industry and hardship for individual owners." (*Id.* at 198).

To justify these adverse consequences, the Commission concluded that a more compelling and unambiguous showing of need was required than the mere "hope or expectation that a change in ownership would bring public benefits." (*Id.* at 196-97, ¶ 108). Accordingly, the Commission set out to determine whether there was an actual need for divestiture in cross-ownership markets apart from the presumed value of maximum diversification of ownership, sufficient to justify divestiture under these circumstances. After reviewing the record (which contained no such showing of need [24]), the Com-

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[24] *See generally supra*, pp. 9-10. There was, for example, no showing of a pattern of abuses of cross-ownership by existing cross-

mission concluded that divestiture should be required only where it appeared from the ownership structure in the market that there might be a lack of "real community-wide diversity . . . on . . . topics of local concern." (*Id.* at 203, ¶ 112).

The Commission found such a prima facie threat to diversity in 16 markets where either the only newspaper and television station, or the only newspaper and radio station in a market not served by a television station, are commonly owned. In these "egregious cases," notwithstanding the availability of other media, the Commission concluded that there was no "single full-fledged choice . . . available . . . ." In that sense, the cross-ownership in such a market had "an effective monopoly in the marketplace of ideas as well as economically." (*Id.* at 203).

On the other hand, in markets where a newspaper cross-ownership faces full-fledged direct broadcast competition in addition to the other sources of diversity, there was no such prima facie lack of either diversity or competition. In these circumstances, the Commission concluded that to order divestiture "regardless of competition" was "not warranted on the record before us and would cause serious public injury." (*Id.* at 201,¶ 112 n.29). Likewise, the Commission found no occasion to require divestiture of television-radio cross-ownerships in any market. (*Id.* at 214, ¶ 125).

The Court of Appeals Decision

In the Court of Appeals, several petitions challenged the prospective rules barring new newspaper cross-

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owners, and the Commission noted that it had not been "offered . . . specific data in this proceeding on which to rely in applying antitrust standards." Second Report and Order (J.A. 201, ¶ 112 n.29.)

ownership on the grounds that they were unconstitutional, unauthorized, or unsupported by the record. The court rejected these contentions and affirmed the rules as appropriate applications of the Commission's diversification policy. (J.A. 362-88).

While no party disputed the decision not to order divestiture for existing radio-television combinations, Respondents National Citizens Committee for Broadcasting and the Antitrust Division filed petitions attacking the Commission's grandfathering of most existing newspaper cross-ownerships. The burden of these petitions was that the Commission should have given greater weight to diversity and less weight to the consequences of divestiture in considering whether the public interest requires the breakup of previously approved television-newspaper cross-ownerships.

The court's opinion not only accepts these arguments but goes beyond them. The court holds that there was no rational basis for treating existing cross-owners differently from new applicants. It therefore concludes that a general divestiture was required for both television-newspaper and radio-newspaper cross-ownerships alike. And having reached its own decision on the merits of the public interest question presented, the court does not confine its holding to a remand for the public interest balance to be reconsidered or redrawn by the Commission. Instead, it concludes that the Commission must adopt "a presumption against cross-ownership" and on remand must follow a "policy of giving diversity of media ownership *controlling* weight." (J.A. 426, 443) (emphasis added).

This holding is not based on any dispute with the Commission's conclusion "that the factual case for broad-scale divestiture had not been made." (*Id.* 411).

The court finds the record "essentially inconclusive" as to any actual negative effects on the public interest attributable to newspaper cross-ownership in general or to existing cross-ownerships in particular. (*Id.* 414). Therefore, it says the question before the Commission turned "primarily on policy, not factual considerations." (*Id.* 396, footnote omitted).

As a matter of policy, the court holds that the Commission erred "in refusing to order divestiture in the absence of a showing of tangible public interest harm." (*Id.* 415). In the court's view, the Commission should have adopted a "presumption that cross-owned stations do not serve the public interest." (*Id.* 417). This presumption is said to find "support" in the Commission's obligation under the Communications Act to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g), (J.A. 29), in the "policies of the First Amendment" favoring diversity, and "perhaps most importantly, [in] the Commission's long-standing policy . . . that diversification of media sources is of central importance." (*Id.* 417-18, footnote omitted).

On the question of retroactive application of the Commission's new cross-ownership policy, the court notes that, under the Communications Act, broadcast licensees have no "vested right" in their licenses, and may be denied renewal if the Commission determines that the public interest so requires. (*Id.* 416). The court disparages each of the Commission's other countervailing policies and values as unpersuasive or unimportant. The policy favoring local ownership is dismissed as "of little concern to the Commission" (*id.* 419); in any event, the court finds no reason to suppose that local ownership will be reduced by divest-

ing the licenses of newspaper cross-owners. (*Id.* 420-21). The court decides that the loss of the unusual continuity of operation provided by newspaper cross-owners is of negligible significance. (*Id.* 421-23). It discounts the Commission's findings that existing newspaper-related television stations have superior programming, because "the Commission did not *stress* this superiority in deciding to grandfather most stations," and because "comparing amounts of programming types aired . . . would . . . seem to be a crude measure of the public interest." (*Id.* 399) (emphasis added). It rejects the possibility that a mass divestiture could result in a shortage of broadcast capital, on the ground that the same shortage could result from voluntary sales which the Commission permits. (*Id.* 425).

All the Commission's countervailing concerns, the court concludes, reflect "lesser policies" than diversity. (*Id.* 427). In addition, they are not supported by factual showings in the record that breaching these policies would entail actual harm to the public interest. (*See id.* 413-14, 426-27). "In sum, the Commission could not have rationally concluded that [they] . . . justified grandfathering absent a show of harm," or that "their potential impairment overcame the presumption against cross-ownership." (*Id.* 426, footnote omitted). Divestiture is therefore required except in special cases "where the evidence clearly discloses that [a] cross-ownership is [affirmatively] in the public interest." (*Id.* 431).

Finally, the court holds that even if the Commission could properly grandfather existing newspaper cross-ownerships, the decision to order divestiture in sixteen markets where cross-ownerships were found to have an

"effective monopoly" was irrational and could not stand. The court finds no support in the record for "the conclusion that divestiture would be more harmful in the grandfathered markets than in the sixteen affected markets," or that there was a compelling need for divestiture in the latter markets. And it appears to conclude that in those markets the Commission could not rely on the presumptive expectation that increasing the number of separate media owners will increase the diversity of viewpoints expressed. (*Id.* 429-30).[25]

In a subsequent opinion on a motion to stay the mandate pending this Court's review, the Court of Appeals left no doubt that it had instructed the Commission to adopt a rule on remand, subject to a waiver provision for exceptional cases. Having affirmed the prospective ban on *new* newspaper cross-ownerships, the court said its decision had "ordered the Commission . . . to ensure that *everyone* [will] be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure. . .)." (*Id.* 443) (emphasis added).

SUMMARY OF ARGUMENT

This Brief is submitted in support of the Commission's decision that the public interest does not require general divestiture of existing newspaper cross-ownerships. Under the applicable standards of appellate re-

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[25] The Court said:

"Although the affected markets contain fewer voices, the amount of diversity in communities with additional independent voices may in fact be no greater. The Commission 'must do more than enumerate factual differences, . . . it must explain the relevance of those differences to the purposes of the Federal Communications Act.' [Citation omitted]." (J.A. 429-30).

view, the central question is whether, as the Court of Appeals concluded, this view of the public interest is irrational in light of the record. In fact, the decision to grandfather most of the cross-ownerships repeatedly approved by the Commission in the past is solidly grounded in established, judicially-recognized Commission policies and in rational public interest concerns. Since there is no possible dispute as to the lawfulness of existing newspaper cross-ownership under the Communications Act, the Court of Appeals exceeded its authority in reversing the Commission and, a fortiori, in requiring the Commission on remand to order general divestiture.

For 40 years, the Commission has consistently found individual newspaper cross-ownerships to be in accord with the public interest under the Communications Act. The question in the present rule-making proceeding was whether this established view of the public interest should now be changed. Despite an exhaustive record and the participation of a number of opponents of cross-ownership, there was no showing of changed circumstances supporting a change of policy, and no showing of recurrent abuses of cross-ownership or other actual harm to the public interest calling for regulatory relief. Instead, the case for divestiture rested on the Commission's long-standing presumption that diversification of ownership serves the public interest because it is likely to result in greater diversity of information and viewpoints in the marketplace of ideas—a venerable policy which has not heretofore precluded the licensing of newspaper cross-owners. Accordingly, the Commission could reasonably have concluded that no change at all in its policy toward newspaper cross-ownership was required.

The fact that the Commission nonetheless decided in its discretion to change policy on a prospective basis as applied to applications for new licenses does not affect the rationality of its decision not to change its renewal policy as applied to existing licensees. The question presented by the Commission's divestiture proposal is quite different from the question whether newspaper applicants for a new license, who have long been disfavored as against other qualified applicants, should now be wholly excluded. The Commission's established general licensing policy distinguishes sharply between the standards applied in selecting among applicants for new licenses on the one hand, and the evaluation of renewal applications submitted by existing licensees on the other. The principal ground of the distinction has been that, in the Commission's view, a station's past record of actual performance provides a better basis for predicting the quality of future service to the public than do the abstract predictive criteria, such as the presumption disfavoring cross-ownership, that are applied where only new applicants are involved.

Moreover, like other administrative agencies, the Commission has discretion in changing policy to grandfather relationships established under the prior policy unless convinced that the public interest requires it not to do so. Grandfathering is a commonplace of both statutory legislation and legislative rule-making by administrative agencies, reflecting a general bias of the legal system against retroactive legislating. It has been routinely practiced by the Commission itself in adopting new rules, including rules designed to diversify broadcast ownership. Grandfathering is the preferred approach for administrative agencies because it avoids

disruption of established arrangements and disappointment of expectations built on prior policy. Thus, the Commission's decision to grandfather in this case required no special justification.

In the absence of a concrete showing of need for divestiture, the Commission's decision to grandfather is also rationally supported by the several specific adverse effects on broadcast service that the Commission believed were potential consequences of broad divestiture—the loss of the continuity of meritorious service provided by newspaper cross-owners as a group, the possible loss of meritorious local ownership, and the possibility that new owners would confront a scarcity of broadcast capital in the wake of a general divestiture. There is specific support in the record for the possibility that each of these consequences could occur. Indeed, the loss of exceptional continuity of ownership, on which the Commission placed primary reliance in furtherance of a long-standing Commission policy, is certain to occur.

In these circumstances, the court exceeded its authority in reversing the Commission's decision to grandfather. The Commission violated no law in reaching that decision; it merely decided to continue doing what it has lawfully done for more than 40 years. The court's dispute with the Commission is wholly one of policy as to the relative weight to be given to the pertinent considerations that the Commission rationally took into account. Accordingly, apart from the plain error of instructing the Commission as to what public interest conclusions it must reach on remand, the court improperly substituted its judgment for that of the Commission on a question of public interest policy.

Even though the Commission's decision to grandfather save in exceptional cases is thus free of error, there remains a possible separate question as to the exceptional cases in which divestiture is required. The decision to order divestiture where a cross-ownership has an "effective monopoly" of major mass media addressing local issues in its market was not based on any record showing of need, but on the Commission's judgment that in such markets there is a prima facie danger of inadequate diversity or anti-competitive market conditions. That conclusion, although not required, was not irrational. In any event, it does not affect the validity or rationality of the policy determination to grandfather except where such a prima facie danger is recognized.

For these reasons, the decision of the Court of Appeals should be reversed, and the Commission's grandfather rules should be affirmed.

ARGUMENT

I. THE COMMISSION RATIONALLY CONCLUDED THAT THE PUBLIC INTEREST DOES NOT REQUIRE WHOLESALE REVERSAL OF ESTABLISHED COMMISSION POLICY TOWARD LONG-APPROVED NEWSPAPER CROSS-OWNERSHIPS.

As posed by the Court of Appeals, the question presented by the Commission's decision not to order general divestiture for existing newspaper cross-ownership is

> "whether the agency decision is rational and based on consideration of the relevant factors, *Citizens to Preserve Overton Park* v. *Volpe,* [401 U.S. 402, 416 (1971)] . . . ; *Bowman Transportation* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285 (1974); whether, in terms of the APA, the

> agency decision is arbitrary and capricious." (J.A. 394).

The court did not fault the Commission for any failure to take account of relevant public interest considerations. Nor did it dispute the Commission's evaluation of the evidence of record.[26] Instead, it held that the Commission's policy choice was irrational—that "the Commission could not have rationally concluded that the competing policies it offered justified grandfathering absent a showing of harm." (J.A. 426).

The Commission's decision to grandfather existing cross-ownerships in all but exceptional cases was in substance a decision not to change its overall policy toward previously-approved cross-ownerships in the absence of an affirmative showing of need. That decision, rational on its face, reflects the Commission's established general licensing policy. Moreover, grandfathering in the absence of a showing of affirmative need for a retrospective policy change is routine practice at the Commission and in legislative rule-making generally, and requires no special justification. The Commission's decision is also fully supported by the specific adverse public interest consequences for broadcast service identified in its opinion. In sum, the justification for the decision to grandfather is so ample that the more substantial question on the record of this proceeding is whether a decision *not* to grandfather could be rationally explained.

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[26] See J.A. 411-15.

A. Neither the Record Nor the Court of Appeals Opinion Identifies Any Change of Circumstances Requiring a Change In Long-Standing Commission Policy.

The Communications Act authorizes the Commission to grant and renew licenses for broadcast facilities if it finds that public interest, convenience, or necessity will be served thereby. 47 U.S.C. § 307(a), (d) (J.A. 29-30). Under this standard, broadcast licenses are granted initially for a three-year term and must be renewed every three years thereafter.

Since the Communications Act was passed in 1934, the Commission has granted and triennially renewed broadcast licenses for daily newspaper owners publishing in the city of license. By 1955, with the benefit of the Commission's early affirmative encouragement, there were 127 television-newspaper cross-ownerships,[37] of which some 79 remained in 1974.[38] There have been larger numbers of radio-newspaper combinations throughout the life of the Commission.[39] In its repeated renewals of the licenses of cross-owned stations over the years, the Commission has made literally thousands of separate findings that the licensing of such cross-ownerships serves the public interest, convenience, and necessity under the Act.

Nor is the present proceeding the first time the Commission has considered treating the question of newspaper cross-ownership by general rule. In 1943, at a time when the Commission had begun to adopt rules

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[37] J. Udell, *supra* note 23, p. D-27.

[38] Second Report and Order ¶ 112 n.29 (J.A. 201). The number of newspaper-television cross-ownerships has been further reduced since the record was closed.

[39] *See* C. Sterling, *supra* note 22 (Exh. 682-687).

limiting common ownership of broadcast media in the same market in order to promote diversity,[40] it examined that possibility at length and decided "not to adopt any general rule with respect to newspaper ownership of radio stations." [41]

In short, the question presented for public comment by the Commission's Further Notice in this proceeding was scarcely one of first impression. The question was whether the Commission's policy of approving newspaper cross-ownership as consistent with the public interest, spanning the 40 years of the Commission's existence, should now be changed.

1. The Commission Was Not Required to Make Any Change in Its Policy.

The Commission does have discretion to change policy in the light of changed circumstances or evolving perceptions of the public interest. In some instances, a change of even firmly established policy could be effectively compelled by new developments affecting the public interest. But the established policy presumptively defines the public interest until a need for change has been shown. And it is the change of established policy, not its continuation, that requires special justification.[42]

Curiously, the opinion of the court below makes no attempt to explain why a change of Commission policy

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[40] *See infra* p. 38.

[41] Newspaper Ownership of Radio Stations, 9 Fed. Reg. 702 (1944).

[42] *See* Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971); Pinellas Broadcasting Co. v. FCC, 230 F.2d 204, 206 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956).

was required. The court dismisses the record evidence on the actual effects of newspaper cross-ownership as "essentially inconclusive" and irrelevant to the proper disposition of the case. (J.A. 414). On an inconclusive record, the court holds that the Commission's long-standing public interest objective of diversifying broadcast ownership must control. It neither asks nor answers why this objective must *now* control the question of newspaper cross-ownership, when the Commission has until now consistently concluded that it does not. The court has, in effect, treated the Commission's notice of rule-making proposing a change in its cross-ownership policy as if it were a decision establishing the policy it proposed for consideration. The Commission's eventual decision not to change policy is thus transformed in the court's opinion into a decision to make a change that requires some special showing.[43]

In fact, the record before the Commission contained no showing of diminished diversity, decreased competition, or any other new developments suggesting, much less requiring, that previously approved cross-ownerships should now be condemned.[44] Nor did the Commission find any pattern of abuses or other adverse consequences of existing cross-ownership pointing to a previously unperceived need for remedial action. It concluded—and the court agreed—that the case for ending newspaper cross-ownership rested wholly on the theoretical public interest gain to be "hoped for or expected" from broadcast diversification.[45] And nothing in

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[43] *See* J.A. 418-19.

[44] *See supra* pp. 9-10, 16.

[45] *See supra* pp. 16, 19.

the record as assessed by the Commission or by the court shows that gain to be greater now than it was for the 40 years when the Commission consistently found that it was not enough. There are now, in fact, more separate broadcast and newspaper owners in cross-ownership markets than before.[46]

2. The Commission's Decision to Change Policy Prospectively Does Not Affect Its Discretion Not to Change Its Renewal Policy.

The Commission decided, in its discretion, to make a change in its newspaper cross-ownership policy as applied prospectively to new applicants. It did so, not because it saw a new or urgent need, but expressly because it believed that the "special reason for encouraging newspaper ownership, even at the [presumed] cost of a lessened diversity, is no longer generally operative in the way it once was."[47] While that decision was not compelled by anything in the record, this Brief proceeds on the assumption that it was within the Commission's public interest discretion.[48] Whatever its merits, that decision neither affects the Commission's discretion to decline to change its policy toward renewal of existing licensees, nor relieves the Commission of the necessity of justifying any such change it might order.

The Commission's stated reason for its prospective policy change, *i.e.*, the increased availability of other qualified license applicants now that the risks attached to broadcast investments have diminished, has no ap-

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[46] *See supra* p. 11.

[47] Second Report and Order ¶ 100 (J.A. 190).

[48] If the prospective ban is unlawful, the grandfather issue would of course be moot.

plication to the question whether renewal of the licenses of incumbent cross-owners must now be deemed generally contrary to the public interest. As the Commission has long recognized, decisions on license renewal applications present a quite different public interest question than decisions on applications for new licenses. In both types of decisions, the Commission must predict how the applicant would operate its station during the ensuing three-year license term. But as the Court of Appeals has noted:

> "[A]lthough in granting an initial license the Commission must of necessity engage in some degree of forecasting future performance, in a renewal proceeding past performance is its best criterion." *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1009 (D.C. Cir. 1966)."

Where an applicant for a new license is involved, the forecast must rest heavily on presumptions arising from various predictive considerations that the Commission has developed for want of a record of factual performance on the station in question.

This distinction is most sharply defined in the Commission's treatment of comparative licensing proceedings, in which more than one applicant seeks the same license. These proceedings are of two kinds: those in which only new applicants are involved, and comparative *renewal* proceedings in which one of the applicants is an incumbent licensee. The Commission chooses among *new* applicants on the basis of a series of predictive presumptions codified in a 1965 *Policy State-*

" *See also* KFKB Broadcasting Ass'n, Inc. v. Federal Radio Comm'n, 47 F.2d 670, 672 (D.C. Cir. 1931).

ment on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965). The foremost of these is the presumption underlying the Commission's ownership diversification policy—that diversification of ownership will result in greater diversity of information and opinion. A second set of presumptively beneficial characteristics includes local ownership and integration of local ownership with station management, participation by the licensee in the civic affairs of the community, and the applicant's past broadcast record with other stations and communities. But these criteria are not applied in the same way to comparative renewal proceedings. Where a renewal applicant is involved, the Commission looks principally at the record, and a record of proven meritorious service in the public interest will ordinarily be controlling.[50]

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[50] *See* Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, —— F.C.C.2d ——, 40 P&F Radio Reg. 2d 763 (1977); Cowles Florida Broadcasting, Inc., 62 F.C.C.2d 953, 955-57 (1977), *appeal pending,* Central Florida Enterprises Inc. v. FCC, D.C. Cir. No. 76-1742; Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970), *rev'd,* Citizens Communications Center v. FCC, 447 F.2d 1201, 1214 (D.C. Cir. 1971); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854-55 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971), *rehearing denied,* 404 U.S. 877 (1971).

In 1970, the Commission articulated this long-standing fundamental difference in its treatment of comparative renewal applicants in the formal Policy Statement Concerning Comparative Hearings cited in the preceding paragraph of this footnote. That 1970 Policy Statement also eliminated comparative hearings altogether on competing applications if the incumbent established that it had a record of substantial performance in the public interest and had not been guilty of serious infractions of applicable laws or Commission rules or policies. The Court of Appeals held this procedure invalid on the ground that the Communications Act requires a full hearing for each applicant. Citizens Communications

The Court of Appeals has previously recognized this basic distinction with approval as applied specifically to newspaper cross-ownership. In *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970) *cert. denied*, 403 U.S. 923 (1971), *rehearing denied*, 404 U.S. 877 (1971), the Commission had granted a license to a new applicant for a station previously operated by a newspaper cross-owner. It had treated the cross-owner as a new applicant, not as an incumbent seeking renewal, because of special circumstances arising from the owner's attempt to exert improper influence at the Commission. Therefore, the Commission decided the case on the basis of the 1965 Policy Statement, *supra*, relying heavily on the criterion of diversification of ownership. The Court of Appeals affirmed expressly on the ground that the cross-owner was properly treated as a new applicant. Had an ordinary and meritorius renewal applicant been involved, the court made clear that the Commission's decision to oust an incumbent newspaper cross-owner on the strength of the Commission's general diversification policy would have presented different and serious questions. *Id.* at 854.

The conclusion of the court below that the Commission's diversification policy requires general divestiture of existing cross-ownerships altogether missed this fundamental distinction in Commission practice between the treatment of renewal applicants and other

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Center v. FCC, *supra*. But despite extensive dicta purporting to tell the Commission what standards to apply in assessing the performance of existing licensees, the court accepted the premise that "incumbent licensees should be judged primarily on their records of past performance." 447 F.2d at 1213. The Commission's present policy continues to reflect that principle. *See* Formulation of Policies Relating to the Broadcast Renewal Applicant *and* Cowles Florida Broadcasting, Inc., both *supra*.

licensing questions. The error may have resulted from the court's apparent confusion about the Commission's licensing policies. At one point the court miscites the 1965 Policy Statement on Comparative Broadcast Hearings, *supra,* as the "1965 Policy Statement on Comparative *Renewal* Hearings." (J.A. 352 n.9) (emphasis added). Elsewhere it states that the 1965 Policy Statement "by its terms . . . applies . . . to comparative renewal hearings" (J.A. 419 n.94), whereas in fact its terms make no reference to renewal proceedings.[51]

Whatever the reason, the court failed to recognize that the proposal to order divestiture for existing cross-owners was a proposal to change a firmly established policy not dependent upon or determined by the Commission's policy toward new applicants. The court thus

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[51] *See* Cowles Florida Broadcasting, Inc., *supra* note 50, 62 F.C.C. 2d at 957.

The court also incorrectly states that the "Commission has applied the *1965 Policy Statement* in noncomparative hearings, although by its terms it is not applicable," citing Seven (7) League Productions, Inc., 1 F.C.C.2d 1597 (1965), and Belo Broadcasting Corp., 47 F.C.C.2d 540 (1974). (J.A. 352 n.9). The statement is wrong in fact and the cited cases do not support it.

The court may have meant to say that the 1965 Policy Statement has been applied in comparative *renewal* hearings, although by its terms it is not applicable to renewals. The cases relied on by the court were cited in briefs as standing for that proposition, and they in fact involved comparative renewal hearings. If that is what the court meant, it was still confused. In the cited cases, the 1965 Policy Statement was applied only to the introduction of evidence. *See* Cowles Florida Broadcasting, Inc., *supra,* at 957 and n.7. In the *Belo* case, the Commission stressed that, on the merits, primary weight is given to the incumbent's past performance. 47 F.C.C.2d at 544. As the Court of Appeals has recognized elsewhere, these cases do not indicate that the Commission applies the substantive standards of the 1965 Policy Statement to incumbent licensees with records of good performance. *See* Citizens Communications Center v. FCC, *supra* note 50, 447 F.2d at 1208-09 n.23.

misperceived the decision to grandfather as a new policy initiative by the Commission to protect existing licensees rather than a decision to continue existing policy in the absence of a demonstrated need for change.

B. The Commission Has Discretion to Grandfather Absent an Affirmative Showing of Public Interest Harm.

Quite apart from the basic distinction between incumbent licensees and new applicants in the Commission's licensing scheme, the decision to grandfather is an exercise of a discretion inherent in the very power to make legislative rules. Grandfathering existing relationships established in reliance on a prior policy that is being changed is a routine regulatory tool for the Commission, for other administrative agencies and for Congress. It is rooted in the empirical tradition of regulatory legislation in the United States and in the fundamental bias of the legal system against retroactive rule-making. It is an intrinsically rational approach that needs no special justification.

1. Grandfathering Is A Routine Commission Practice.

As the Commission said in the *Second Report and Order*,

> "Although not unprecedented, the idea of divestiture of ownership [is] . . . a departure from the typical Commission approach of limiting any new rules to prospective effect." (J.A. 137, ¶ 5).

A retroactive application of new rules so as to require divestiture entails inherent "disruption" and

"hardship," that "must be examined if fairness is to be achieved." (Id. 198, 189, ¶¶ 109, 99).

Although the Commission treated these propositions as self-evident, requiring no citation to authority, they are well supported by Commission precedent. The Commission has often taken account of the "inherently disruptive" consequences of divestiture.[52] It has frequently grandfathered existing non-conforming arrangements when changing policy in a variety of contexts.[53] It has grandfathered, or otherwise accommodated the disruptive consequences of retroactive application, when adopting policy changes specifically aimed at promoting diversification of ownership.[54] The grandfather principle is incorporated in the

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[52] *E.g.*, Report on Chain Broadcasting Order No. 37, Dkt. No. 5060 (1941) at 67; Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288, 292 (1953); Distribution of Television Broadcasting Signals by CATV Systems, 2 F.C.C.2d 725, 784-85 (1966); Diversification of Control of CATV Systems, 23 F.C.C.2d 833, 835 (1970).

[53] *E.g.*, Revision of FM Broadcast Rules, 23 P&F Radio Reg.2d 1801, 1836-39 (1962) (adoption of FM table of assignments with grandfathering of existing stations having non-conforming antenna height or broadcast power); Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725, 784-85 (1966), *aff'd sub nom.*, Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968) (rules limiting signal carriage by cable television systems with grandfathering of non-conforming systems already in operation); Cable Television Report and Order, 36 F.C.C.2d 143, 185 (1972), *aff'd sub nom.*, ACLU v. FCC, 523 F.2d 1344 (9th Cir. 1975) (revision of cable signal carriage rules with grandfathering of non-conforming existing systems); Interstate and Foreign Message Toll Telephone Service, 57 F.C.C.2d 1216, 1220 (1976); 59 F.C.C.2d 83, 84-86 (1976) (rules on telephone terminal equipment, grandfathering equipment currently in use).

[54] No divestiture was required when the Commission prohibited overlapping service contours between commonly owned stations in

text of the Commission's duopoly rules forbidding ownership of more than one station in each broadcast service (AM, FM, or television) with overlapping service contours.[55] Indeed, in the *Second Report and Order* under review, the Commission again reaffirmed its decision to grandfather all existing radio-television cross-ownerships—which far outnumber newspaper cross-ownerships—prohibited prospectively under the

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each broadcast service, Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1476 (1964); or when it adopted policies regarding concentration of ownership in the top 50 markets, Hearings on Applications for Second VHF Station, 3 P&F Radio Reg.2d 909 (1964), Interim Policy on Television Multiple Ownership, 5 P&F Radio Reg.2d 271 (1965), and Multiple Ownership of Television Broadcast Stations, 12 P&F Radio Reg.2d 1501, 1507 (1968); or when it proposed and adopted rules prohibiting television-radio cross-ownership in the same market, 33 Fed. Reg. 5315 (1968) and Multiple Ownership of Standard, FM & Television Broadcast Stations, 22 F.C.C.2d 306 (1970) (J.A. 33).

When the Commission adopted multiple ownership rules limiting the total number of station licenses in each broadcast service permitted to any one owner, it deliberately set the limits high enough to avoid "extensive divestment of holdings by existing licensees," on the ground that "this would be unduly disruptive." Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288, 292 (1953). Even in the few cases where existing holdings exceeded the new limits, divestiture was not automatic but was to be determined on a case-by-case basis. Amendment of Multiple Ownership Rules, 9 P&F Radio Reg. 1563, 1572 (1953). It appears that hardly any divestiture at all was in fact ordered. *See* Howard, "Multiple Broadcast Ownership: Regulatory History," 27 *Fed. Comm. B.J.* 1, 15 (1974).

See also CATV-TV Cross-Ownership Rules, 55 F.C.C.2d 540 (1975), *appeal pending*, NCCB v. FCC, D.C. Cir. No. 75-1933, where the Commission ordered divestiture of cable systems commonly owned with television stations only in egregious cases, notwithstanding its prospective ban on all future such cross-ownerships.

[55] 47 C.F.R. §§ 73.35 note 8, 73.240 note 8, and 73.636 note 8.

First Report and Order, and no party challenged this sweeping grandfather rule in court.

The only change in the Commission's broadcast diversification rules that has *not* on its face taken account of the special problem presented by retroactive changes is its adoption of the original AM duopoly rules in 1943, prohibiting existing as well as new ownership of more than one AM station in the same market.[56] That decision, however, was preceded by measures addressed to radio duopoly which had only prospective effect. The Commission adopted duopoly rules for FM radio and for television, where no divestiture was required, in 1940 and 1941 respectively; but it did not at the same time adopt any such rules for AM radio, the only broadcast service then generally available to the public and the only service in which there were existing instances of duopoly ownership. Instead, the Commission sought to deal with AM duopoly on a case-by-case basis.[57] The decision to order divestiture, which was not made until nearly three years later, was first proposed only after the Commission had determined in its chain broadcasting investigation that existing network duopoly ownerships were anticompetitive and should not be allowed to continue.[58]

In short, the Commission's grandfathering in the present case, where there was no showing of affirmative need for divestiture, is a consistent application of

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[56] Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16065 (1943).

[57] Report on Chain Broadcasting, Order No. 37, Dkt. No. 5060 (1941) at 2.

[58] *Id.* at 68.

a well-established uncontroversial approach to rule-making. That approach is peculiarly appropriate as applied to existing broadcast licensees under the Communications Act, since their performance is subject to review and approval every three years in license renewal proceedings. The approach is as rational here as when practiced throughout the Commission's history.

2. The Commission's Practice of Grandfathering Reflects a Basic Principle of the Legal System.

As the Commission's customary approach suggests, grandfathering is a commonplace of American regulatory legislation and administrative rule-making. The principle of prospective application permeates the major federal regulatory statutes. In some cases, entire regulatory schemes have been imposed only on a prospective basis, with all existing relations permanently grandfathered.[39] Where grandfathering is not

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[39] Thus, for example, the Civil Aeronautics Act of 1938 required all air carriers to obtain certificates of public convenience and necessity as a condition of engaging in air transportation, but provided that a carrier which was operating when the Act was passed was entitled to a certificate "upon proof of such fact only . . . unless the service rendered by such applicant . . . was inadequate . . . ." Pub. L. No. 706, 75th Cong., 3d Sess., 52 Stat. 973, 987-88 (1938). The Act thereby effectively grandfathered an entire industry subject to new regulation.

Such industry-wide grandfather exemptions to existing carriers have also been granted to motor carriers, 49 U.S.C. §§ 306, 309; water carriers, 49 U.S.C. §§ 909(a), (f); and freight forwarders, 49 U.S.C. § 1010(a).

Similarly, the comprehensive drug regulatory scheme of the Federal Food, Drug, and Cosmetic Act of 1938 is directed primarily at "new drugs." *See* 21 U.S.C. § 321(p)(1). The original Act grandfathered drugs marketed before the Act was passed. *See*

commanded by the statutes themselves, the regulatory agencies have routinely adopted it in the exercise of their public interest discretion.[60] Such discretionary ad-

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Note, "Drug Efficacy and the 1962 Drug Amendments," 60 *Geo. L.J.* 185, 187 (1971). The 1962 amendments imposing major new regulations on sale and labeling not only preserved much of the original grandfathering of pre-1938 drugs, but also grandfathered some pre-1962 drugs against application of the new standards. Pub. L. No. 87-781, § 107(c)(4), 76 Stat. 789 (1962); Note, *supra*, 60 *Geo. L.J.* at 192 & 195.

See also, e.g., grandfather provisions under the Natural Gas Act, 15 U.S.C. § 717 f (e); the Clean Air Act, 42 U.S.C. §§ 1857 f-1, 1857 f-2, 1857 f-5, 1857 f-5a, 1857 f-6f; the Federal Water Pollution Control Act, 33 U.S.C. § 1316 (applicable only to new sources), § 203(c)(1) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note; and the Newspaper Preservation Act, 15 U.S.C. § 1803 (a), (b).

[60] Much administrative grandfathering is so routine that it is done as a matter of course without specific mention even in agency regulations. At the Food and Drug Administration, this practice of grandfathering in the normal course is now codified in a regulation providing that any

> "action taken or completed in conformity with a guideline [of general applicability promulgated by the FDA] . . . which has subsequently been amended or revoked shall remain acceptable to the Food and Drug Administration unless the Commissioner determines that substantial public interest considerations preclude such continued acceptance." 21 C.F.R. § 10.90(b)(6).

Under this rule, the FDA consistently applies new testing standards for harmful effects of the chemical substances present in the products subject to its regulation only to chemicals first tested after the standard is adopted, unless an affirmative need for retesting is found.

In agencies which have not so codified their routine grandfathering practice, the practice is occasionally referred to in judicial or agency decisions. *E.g.*, South Terminal Corp. v. EPA, 504 F.2d 646, 674 (1st Cir. 1974) and Citizens Ass'n of Georgetown v. Washington, 370 F. Supp. 1101, 1108-09 (D.D.C. 1974) (EPA grandfathering of existing parking spaces under regional air quality control plan); Executive Withdrawal Order, 55 I.D. 205, 210-11 (1935) and Eagle Peak Copper Mining Co., 54 I.D. 251, 255-56 (1933) (Interior Department grandfathering of non-vested interests

ministrative grandfathering is employed even for new health and safety standards, where the importance of the public interests involved is hardly less than a speculative increase in diversity.[61]

When the validity of discretionary administrative grandfathering has been challenged, the courts have

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in public lands upon withdrawal of the lands from public entry).

Sometimes, specific instances of routine grandfathering are embodied in regulations or less formal agency publications. *E.g.*, 33 C.F.R. § 159.12, 40 C.F.R. § 140.3(e) (existing vessels exempt from new EPA standards for marine sanitation devices); U.S. Postal Service, Delivery Service, Filing No. 331-1, Amend. #5, September 29, 1972, as amended by Memorandum on Delivery Policy of Nov. 16, 1976; 20 C.F.R. § 405.415(a)(3)(ii)(a) (HEW cost accounting rules for health-care providers not applicable to "old providers" who remain in medicare program); Export Administration Bulletin No. 161, Oct. 18, 1976, at 9 (Arab boycott rules regarding letters of credit applicable only to new letters).

Prospective application is the recognized common practice of the Internal Revenue Service in adopting new rules that operate to the disadvantage of taxpayers. *E.g.*, Rev. Rul. 77-40, Internal Revenue Bulletin No. 1977-29, July 18, 1977. *See generally* Lesavoy Foundation v. Comm'r, 238 F.2d 589, 591 (3d Cir. 1956); Rogovin, "The Four R's: Regulations, Rulings, Reliance and Retroactivity—A View From Within," 52 *Standard Federal Tax Reports* No. 56 at 16-17 (Dec. 1, 1955); Griswold, "A Summary of the Regulations Problem," 54 *Harv. L. Rev.* 398, 411-18 (1941).

[61] For example, standards restricting water pollution and air pollution imposed on new sources are often applied less stringently to existing sources. *E.g.*, 40 C.F.R. §§ 129.102(b)(3), 129.103(b)(3) (effluent water pollutants); 16 C.F.R. §§ 1201.1(b), 1207.2 (Consumer Product Safety Comm'n standards for architectural glass and swimming pool slides); 33 C.F.R. § 159.12, 40 C.F.R. § 140.3(e) (marine sanitation devices); Air Programs Office, EPA, Region IV, Evaluation of the Georgia Control Strategy, June 21, 1974, revised March 31, 1975, at 2-3; *and see* Kennecott Copper Corp. v. Train, 526 F.2d 1149, 1152 & n.16 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976) (air pollutant emissions from smokestacks). *See also* the regulation of the Food and Drug Administration cited in note 60, *supra*.

routinely upheld it,[43] just as they have routinely sustained statutory grandfathering schemes against claims that they are irrational classifications violating constitutional requirements of equal protection or due process.[44] But the rationality of grandfathering where there is no compelling need for change is so obvious and so basic to the legal system that it has seldom been challenged. As this Court has recognized, the freedom to change course on a prospective basis, without prejudice to established expectations based on prior policy, is an essential element in the legislative and rule-making process. *United States* v. *Maher*, 307 U.S. 148, 153 (1939). Prospective rules permit the rule-maker to respond to "the felt need for regulating . . . through familiar administrative devices, while at the same time . . . [satisfying] the dictates of fairness by affording sanction for enterprises theretofore established." *Id.*[45]

Moreover, the prevalence of grandfathering reflects a broader bias of the legal system against the

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[43] *See* South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 674 (1st Cir. 1974); Citizens Association of Georgetown v. Washington, 370 F. Supp. 1101, 1108-09 (D.D.C. 1974).

[44] *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303-06 (1976) (per curiam); Stanley v. Public Utilities Commission, 295 U.S. 76 (1935) (per curiam); Watson v. Maryland, 218 U.S. 173, 178 (1910).

[45] *See also* Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, 227-28 (D.C. Cir. 1967).

When an agency acts prospectively, it has broad discretion to experiment, innovate, or change direction. *See* Amoco Oil Co. v. EPA, 501 F.2d 722, 734-35 (D.C. Cir. 1974); Frontier Airlines, Inc. v. CAB, 439 F.2d 634, 640 (D.C. Cir. 1971); Connecticut Committee Against Pay TV v. FCC, 301 F.2d 835, 837-38 (D.C. Cir.), *cert. denied*, 371 U.S. 816 (1962); American Airlines, Inc. v. CAB, 192 F.2d 417, 421 (D.C. Cir. 1951).

presumptive unfairness of most retroactive lawmaking. "Retroactivity, even where permissible, is not favored, except upon the clearest mandate." *Claridge Apartments Co.* v. *Comm'r*, 323 U.S. 141, 164 (1944)."[65] Retroactive laws are sometimes held unconstitutional.[66] When statutes are ambiguous as to whether they are to apply retroactively, they are "presumed, in the absence of clear expression to the contrary, to operate prospectively," *Hassett* v. *Welch*, 303 U.S. 303, 314 (1938); *Place* v. *Weinberger*, 497 F.2d 412, 414 (6th Cir.), *cert. denied*, 419 U.S. 1040 (1974). Responding to the same perception of the potential unfairness of retroactive application, the courts have sometimes forbidden agencies to give new rules retroactive effect.[67] And to avoid retroactivity, agencies are, as a general matter, expected insofar as possible to make policy through the "quasi-legislative promulgation of rules to be applied in the future," rather than by adjudication. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

The Court of Appeals concluded that the Commission was not precluded from applying its new rules

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[65] *See also* Story, *Constitution* § 1398 (1891):

"Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."

[66] *E.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); Coombes v. Getz, 285 U.S. 434 (1932).

[67] *See, e.g.*, Coe v. Secretary of HEW, 502 F.2d 1337, 1340 (4th Cir. 1974); Retail Wholesale and Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972); International Business Machines Corp. v. United States, 343 F.2d 914, 921-23 (Ct. Cl. 1965) *cert. denied*, 382 U.S. 1028 (1966); NLRB v. E&B Brewing Co., 276 F.2d 594, 600 (6th Cir. 1960), *cert. denied*, 366 U.S. 908 (1961).

retroactively so as to require divestiture, because broadcast licensees under the Communications Act do not have any vested right to their licenses after the expiration of the three-year license term (J.A. 416). This conclusion overlooks the "legitimate expectancies of renewal" which the Court of Appeals has elsewhere recognized may arise from a meritorious record of broadcast service.[48] And it does not even speak to the proposition that retroactive application, though not forbidden, may rationally be eschewed by the Commission as a matter of policy. The bias against disappointing expectations and disrupting arrangements based upon existing law or policy is not confined to cases where it is constitutionally compelled.

This is not to suggest that grandfathering is invariably practiced by administrative agencies. On a sufficient showing, an agency may even have a duty to apply new policy retrospectively in order to carry out its statutory mandate.[49] But a decision to grandfather absent a showing of need for retroactivity is self-justifying. It is a decision *not* to grandfather that calls for affirmative support. Until the decision of the Court of Appeals in this case, to our knowledge no court has suggested that there is a presumption *against* grandfathering or that grandfathering must be specially explained. The presumption runs the other way.

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[48] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), *rehearing denied*, 404 U.S. 877 (1971); Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 736 n. 9 (D.C. Cir. 1976).

[49] *See* Joseph v. FCC, 404 F.2d 207, 211-12 (D.C. Cir. 1968).

C. The Decision to Grandfather Is Also Rationally Supported by the Specific Harmful Consequences Feared by the Commission.

In declining to order a general divestiture of newspaper cross-ownerships, the Commission also relied on three potential adverse consequences of general divestiture in this case for broadcast service to the public, the Commission's overriding public interest responsibility. These concerns provide independent rational justification for the decision to grandfather.

1. CONTINUITY OF SERVICE

The Commission's primary concern was the loss of exceptional continuity of service provided by newspaper cross-owners as a group, that would result from divestiture.[70] The record shows that, unlike various other broadcast pioneers, newspaper owners who became licensees in the early days of broadcasting have typically displayed a long-term commitment to providing broadcast service in their community of license, regardless of either hardships in the early years of operation or subsequent opportunities to sell their stations at large profits.[71] At the time of the Commission proceeding, over 80 per cent of the television stations established by newspaper owners before 1948 were still being operated by the original owners. In contrast, nearly half the other stations originated before 1948 had been sold by the original licensee—the majority within five years of the start of broadcast service.[72] The continuity of newspaper

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[70] *See supra* p. 16.

[71] *See generally* Robbins, *supra* note 25 (Exh. 694).

[72] *Id.* (Exh. 710-712). A similar pattern is evident among the early newspaper and non-newspaper owners of radio stations. *Id.* (Exh. 707-710).

ownership and the commitment it commonly reflects, would be permanently ruptured by divestiture.

The importance of continuity to the Commission is related to the premise of the licensing scheme established by the Communications Act. That scheme places licenses to broadcast in the hands of the owners of a multitude of local stations rather than of a few central national outlets. The theory is that local stations will provide a broadcast service tailored to the peculiar needs of local communities. Continuity of service by a licensee over a particular station enables the broadcaster to develop a knowledge of his community and its needs and an expertise in meeting those needs through broadcast service. The Commission's experience has demonstrated that "time is needed to fully or substantially implement" a licensee's proposals for a broadcast service attuned to the needs of the community, "to gain a better understanding of the program needs and desires of the community, and to adjust programming to such needs and interests."[73]

In part, the Commission places special value on long continuity of service because it is exceptional. The high rate of turnover of broadcast licenses has long been a source of Commission concern. It raises the "important public interest question of whether numerous communities throughout this country are being deprived of the benefits which [the Commission] believe[s], based upon [its] experience, come from sustained station ownership."[74] Because of this concern

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[73] Procedures on Transfer and Assignment Applications, 32 F.C.C. 689, 690 (1962).

[74] *Id.*

at the high rate of turnover of broadcast licenses, in 1960 the Commission adopted a rule requiring a full hearing to justify a license transfer during the first three-year license term."[75]

In disparaging the substantiality of this Commission policy, the Court of Appeals argued that it was irrational to be concerned about disrupting continuity, since the Commission permits substantial license turnover by "routinely approving license assignments." (J.A. 423). But the question whether to forbid transfers by licensees who have in fact lost interest in rendering a broadcast service over their stations is quite different from the question whether those licensees who do exhibit a voluntary long-term commitment should be highly prized. Although the Commission has not believed it desirable to lock in licensees who do not wish to continue after three years, the resulting turnover accentuates rather than diminishes the importance of preserving exceptional continuity where it is found.

The court also argued that "a one-time alteration of the ownership structure of the broadcast industry should not effect [sic] the public's interest in quality programming," because the new owners could develop records of continuity of their own which the Commission would presumably not terminate by di-

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[75] 47 C.F.R. § 1.597; Notice of Proposed Rule-Making, 25 Fed. Reg. 12898 (1960). Besides the concern about preserving the benefits of "sustained station ownership," the three-year rule was designed to discourage "trafficking," *i.e.*, the practice of obtaining a broadcast license with the intent to sell it at a profit rather than to provide a broadcast service. *See* Procedures on Transfer and Assignment Applications, *supra* note 73, 32 F.C.C. at 689-90.

vestiture (J.A. 422). This argument discounts the years required for a successor to achieve a comparable expertise in providing a broadcast service responsive to community needs. That aside, the Commission had reason to believe that a non-newspaper successor is far less likely to develop a comparable record of continuity or display a comparable commitment to local broadcasting. The special broadcast service that newspaper owners as a group are able to provide will not be speedily replaced, and may well not be replaced at all.

The importance of continuity is enhanced in the case of newspaper cross-owners because of the quality of the stability of ownership they provide. As the Commission recognized, these licensees have developed "traditions of service" grounded in something more than purely commercial considerations.[76] According to the Commission's programming study, they devote more time to news, public affairs, and other types of programming that the Commission deems valuable to the public interest than do stations not affiliated with newspapers.[77] In short, beyond the fruits of continuity itself, these licensees as a group offer other benefits resulting from the commitment to local broadcast service that causes them to stay.

2. Local Ownership and Economic Dislocation

In addition to the certain loss of continuity of service by meritorious licensees, the Commission also briefly adverted to a possible loss of local ownership and possible economic dislocations as potential adverse conse-

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[76] Second Report and Order at ¶ 109 (J.A. 197).

[77] *Id.* at 198, ¶ 109 n.26.

quences of a general divestiture. Both these concerns are rationally based. Most of the existing newspaper cross-ownerships are locally owned; in the event of divestiture "many sales would have to be to outside interests," [78] the court's speculation to the contrary notwithstanding. (J.A. 421). The Commission's concern about possible economic dislocations is directly supported by showings in the record.[79] While these concerns are of relatively peripheral importance in the Commission's opinion, together with the lost continuity of meritorious ownership that would result from divestiture they constitute a sound basis for the Commission's conclusion that general divestiture should not be ordered in the absence of an affirmative showing of need.

* * *

The Court of Appeals held the Commission's grandfathering decision irrational. It was, instead, so clearly rational that it did not require elaborate explanation. The Commission's summary explanation is, if anything, more than was needed. Its approach was rational as a decision not to change long-established policy without a showing of changed circumstances or previously

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[78] *Id.* at 197, 178-79, ¶¶ 108, 78.

[79] In reviewing the record, the Commission took note of several submissions which sought to show that "new owners of divested stations would face significant economic burdens, principally as a result of paying high prices for broadcast properties that have appreciated greatly over the years." According to these submissions, "because of high interest rates, the cost of debt service will reduce the working capital and profit accumulation which would otherwise be available for programming. . . ." *Id.* at 177-78, ¶ 77. Economic studies included in the record also concluded that in the event of a general divestiture of newspaper-related stations, "in many instances the price will remain too high to service the debt capital necessary to purchase a station." *Id.* at 167, ¶ 57.

unperceived need; rational as a reflection of general Commission licensing policy toward incumbent licensees with records of performance in the public interest; rational as a routine administrative decision to grandfather when adopting new policy where no affirmative showing to support retroactive application has been made; and rational as well on account of the potential adverse consequences of divestiture for broadcast service which the Court of Appeals sought to disparage.

II. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY IN REVERSING THE COMMISSION'S DECISION TO GRANDFATHER.

Since the Commission's decision that general divestiture of newspaper cross-ownerships is not required was plainly rational, the Court of Appeals exceeded its authority in holding the decision invalid. Whatever the precise formulation of the applicable standard of review, a reviewing court is required to affirm an agency decision that has a rational basis unless the decision contains errors of law or is not "based on a consideration of the relevant factors." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).[80]

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[80] *See also* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 145 (1940); K. Davis, *Administrative Law of the Seventies*, § 29.01 (1976).

In *Citizens to Preserve Overton Park*, this Court articulated the appropriate standard of review for agency rule-making under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A):

> "Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to sub-

There is no claim that the Commission failed to take account of any relevant public interest considerations, and its grandfather decision is fully consistent with all pertinent requirements of law.

The Court of Appeals does not suggest that newspaper cross-ownership is forbidden by the Communica-

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stitute its judgment for that of the agency."

The statement that a court must consider "whether there has been a clear error of judgment" does not mean that a court may reverse an agency merely because the court disagrees with the agency's ruling. For "(t)he court is not empowered to substitute its judgment for that of the agency." Rather, the "clear error of judgment" language shows only that the agency's action must have a rational basis.

This principle has been formulated in a variety of ways. *See* Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 290 (1974), *rehearing denied*, 420 U.S. 956 (1975) ("we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the 'arbitrary and capricious' test does not require more"); Ethyl Corp. v. EPA, 541 F.2d 1, 34-36 & n.74 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) ("(t)he immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors . . . It is settled that we must affirm decisions with which we disagree so long as this test is met.") (emphasis in original); NAITPD v. FCC, 516 F.2d 526, 542 (2d Cir. 1975) ("Public policy is not like a single track where only one train can run at a time. 'The court's responsibility is not to supplant [a] Commission's balance of . . . [competing] interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.' . . ."); First National Bank of Fayetteville v. Smith, 508 F.2d 1371, 1376 (8th Cir. 1974), *cert. denied*, 421 U.S. 930 (1975) (" 'Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis' . . . Something more than mere error is necessary to meet the test. . . . To have administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was 'willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case . . . .' ")

tions Act or any other law. No such claim would be tenable under the Communications Act in the face of the Commission's repeated determinations to the contrary in approving cross-ownerships throughout the 40-year life of the Act. This consistent, judicially recognized, administrative construction of the statute by the agency charged with its enforcement is conclusive on the question of legality.[81]

The court does appear to conclude that a presumption against existing cross-ownership is recognized in Commission policy and "supported" by the Communications Act and "policies of the First Amendment" (J.A. 417). No cases are cited in support of that presumption; the court relies instead on the Commission's rhetorical declaration—which the court itself concedes cannot be taken literally—that "nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible."[82] But in the case of existing cross-ownerships, any such presumption in Commission decisions is belied by the Commission's established policy of approving such cross-ownerships over the years. The Commission does not presume that its long-standing consistent policy is wrong.

Promoting diversity of information, opinion and ideas is an important element of the public interest under the Communications Act. The Commission's opinion gives expansive recognition to the importance of that objective. Its prospective rules, as well as its

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[81] *See, e.g.*, Youakim v. Miller, 425 U.S. 231, 235 (1976); NLRB v. Boeing Co., 412 U.S. 67, 74-75 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

[82] J.A. 418, quoting *Second Report and Order*, ¶ 111, J.A. 200.

limited divestiture order, are based upon it. But as shown above, the Commission has never regarded diversification of ownership in the hope of maximizing diversity as controlling on the ultimate public interest question of whether continued licensing of existing meritorious ownerships will provide the broadcast service best attuned to the public interest. The court simply misunderstood the Commission's general licensing policy and ignored its long-standing practice of grandfathering even when adopting new policies designed to promote diversity.[83]

The court's basic disagreement with the Commission is not one of law, but of public interest policy. Although the court recognizes that "the contention that divestiture contains elements common to suspect retroactive legislation goes . . . to the reasonableness" of a Commission decision regarding divestiture,[84] the court apparently concludes, without explanation, that the policies underlying the Commission's bias against divestiture are less important than the hope of increasing diversity. Similarly, the court's argumentative debate with the Commission over the specific adverse consequences for broadcast service that a general divestiture might cause does not show that the Commission's concerns are unintelligible or unfounded,[85] but only that in the court's view they all serve "lesser policies" than diversification of broadcast ownership.[86] Under the Communications Act, public interest policy judgments of this sort are peculiarly within the domain of the

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[83] *See supra* pp. 31-39.

[84] J.A. 390 (footnote omitted).

[85] *See supra* pp. 20, 45-49.

[86] J.A. 427. The court incorrectly asserts that these policies lack "support in the record." *Id.* at 419-27. As shown above at pp.

Commission's regulatory expertise.[87] The "power to weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity'" under such statutes is delegated to the agency, not the courts.[88] And a reviewing court "is not empowered to

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45-49, the record supports the Commission's conclusions that exceptional continuity of meritorious service would be lost in the event of general divestiture, that meritorious local ownership would be reduced, and that broad divestiture could cause economic disruptions.

In any event, if the court means that in a rule-making proceeding the Commission cannot rely on general policies developed on the basis of its experience in administering its statute unless the policies are supported by evidence adduced by the parties to the particular proceeding at hand, it is simply mistaken. "[S]ince rulemaking is 'sub-legislative,' it permits the agency to look beyond the record at a whole range of interests." Verkuil, "Judicial Review of Informal Rulemaking," 60 *Va.L.Rev.* 185, 189 (1974). "The agency, in rulemaking, can look beyond the particular hearing record since it otherwise would be unable to draw upon its expertise." Pacific Coast European Conf. v. U.S., 350 F.2d 197, 205 (9th Cir. 1965); *see also* Flying Tiger Line, Inc. v. Boyd, 244 F. Supp. 889, 892 (D.D.C. 1965); Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy," 78 *Harv.L.Rev.* 921, 937 (1965).

[87] This elementary principle has been fully recognized in prior decisions of the Court of Appeals. In Pinellas Broadcasting Co. v. FCC, 230 F.2d 204 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956), in a comparative proceeding involving *new* license applicants, the Commission chose a local newspaper owner over competing applicants one of whom had no local media interests. The Commission held that diversification, while important, was not determinative. *Id.* at 209. The court said of this determination:

> "The Commission is operating within the area of legislative-executive judgment. The courts cannot interfere so long as the process, the premises, and the judgment are not arbitrary." *Id.* at 206.

See also McClatchy Broadcasting Co. v. FCC, 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957).

[88] Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 293 (1974), *rehearing denied*, 420 U.S.

substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401 U.S. at 416.

Nor does the court stop at substituting its judgment by reversing the Commission. Having rebalanced the public interest considerations underlying the Commission's grandfather rule, the court not only vacates the rule but instructs the Commission to adopt a new rule codifying the court's balance. In so doing, it improperly deprives the Commission of its fundamental discretion to grandfather,[60] and denies it the elementary prerogative of making the final assessment of what the public interest requires in light of the purported legal errors identified by the court. The court thereby contravenes the basic principle of appellate review that administrative public interest determinations, unless mere formalities, may be made only by the agency, and not by a reviewing court. *South Prairie Construction Co.* v. *Local No. 627, Int'l Union of Operating Engineers,* 425 U.S. 800, 806 (1976); *NLRB* v. *Food Store Employees Union,* 417 U.S. 1, 8-9 (1974); *SEC* v. *Chenery Corp.,* 318 U.S. 80, 88 (1943). And it disregards this Court's square holding in *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (1940).

In *Pottsville,* the Court of Appeals also sought to go beyond identifying Commission error and to impose a final result. This Court reversed an order directing the Commission to accept the court-imposed result. A reviewing court, it said,

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956 (1975), *quoting* United States v. Pierce Auto Lines, 327 U.S. 515, 535-36 (1946); *see also* NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957).

[60] *See supra* pp. 35-44.

> "may . . . correct errors of law and on remand the Commission is bound to act upon the correction. [Citations omitted.] But an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." [Citation omitted.] *Id.* at 145.

Once the court had identified the legal error in what the Commission had done, it had

> "exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of 'public interest, convenience or necessity' . . . The Court of Appeals cannot write [its views] . . . into the statute as an indirect result of its power to scrutinize legal errors . . . Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute." *Id.*

The rule confining a reviewing court's role to identification of legal error, besides preserving the "integrity of the administrative process,"[20] protects against the possibility that law will be made on the basis of a court's misapplication or misunderstanding of agency policies, or an inadequate consideration of the relevant public interest factors by the agency, or a mere failure of articulation of explanation in an agency opinion. If the agency is not given a chance to repair such non-legal mistakes, whether the court's or its own,

> "the contingencies of judicial review and of litigation, rather than the public interest, would

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[20] NLRB v. Food Store Employees Union, *supra*, 417 U.S. at 9.

be decisive factors. . . ." *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 145-46.

In the present case, this danger is more than academic. The court misconstrues the agency's diversification policy, elevating diversity from an important public interest factor into a virtually irrebuttable presumption, and ignores or misunderstands a variety of other Commission policies and concerns. In holding the Commission bound by its alleged failure to state satisfactory reasons for not "giving diversity of media ownership controlling weight" (J.A. 443), the court would imprison the Commission in any inadequacies of its opinion-writer and write the court's misunderstanding of Commission policies into law. This mistake exacerbates the usurpation of the Commission's public interest function that pervades the court's opinion.

III. THE COMMISSION'S GRANDFATHER RULES SHOULD BE AFFIRMED.

Because of the plain error of ordering the Commission to require general divestiture, the Court of Appeals decision must be reversed. More fundamentally, the court's holding that the Commission was required to proceed on the basis of a presumption against continuation of its policy toward existing cross-ownerships is in error, and there is no other permissible basis for invalidating the Commission's decision not to order divestiture in the absence of a finding of affirmative need.

The grandfather rules include a provision requiring divestiture of cross-ownerships which the Commission found to have an "effective monopoly"

of major mass media addressing local issues in a particular market. Besides invalidating the decision not to order general divestiture, the court held that the line drawn by the Commission to identify cases of affirmative need for divestiture was irrational. J.A. 429-30.

The Commission's decision to order divestiture in cases of "effective monopoly" is not based on any showing in the record, but on the Commission's prima facie presumption that there was a danger of insufficient diversity of points of view as well as inadequate economic competition in such markets. That presumption is not necessarily compelled. But it does not seem irrational for the Commission to have concluded that any such potential dangers are more likely to be present in cross-ownership markets that lack another local daily newspaper or comparable broadcast station, than where there is such a local competitor. The presence of at least one such competitor would seem to provide both a competitive spur to cross-owned media to offer a greater diversity of information and opinion, and an institutional check against the possibility of abusive use of a cross-ownership to propagandize or indoctrinate. As the Commission recognized, line-drawing often entails some potential arbitrariness. It therefore provided for waiver in individual situations. If divestiture is to be required in any cases, it is difficult to say that the line drawn by the Commission is irrational. In any event, the rationality of the basic decision to grandfather in all but exceptional cases is not affected.

CONCLUSION

For the foregoing reasons, the Commission's rules providing for grandfathering should be affirmed.

Respectfully submitted,

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